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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

SAMUEL H. STONE, AUDITOR, *et al.* - - - - - *Appellants,*

No. 358. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

CITY OF LOUISVILLE, - - - - - - - - - - - *Appellant,*

No. 359. } *VERSUS*

BANK OF LOUISVILLE, - - - - - - - - - - *Appellee.*

Additional Brief for Appellants.

We desire to respond to some of the statements in the brief of counsel for appellee in these two cases, concerning the stipulation obtained from Judge Barker, former City Attorney, and his testimony, which does not appear to be borne out by the record.

The deposition of Judge Barker, taken by appellee, will be found in Record No. 362, pp. 42–63.

I.

The following statement in our original brief is called "remarkable" by appellee's counsel:

> "Is it not probable, therefore, that this retrospective agreement was not reduced to writing and signed until after the decision of the Court of Appeals of June 1,

> 1895? There is nothing in it to show it was executed at an earlier date. Thus this important stipulation appears to have been carried in the memory of counsel until that decision, and then it was formulated for the first time."

The Court's attention is invited to the testimony of Judge Barker, where he is interrogated as to when this document was prepared and signed. (*Ib.*, pp. 50, 51.) He does not fix the date, but states it was before Mayor Tyler's death, which occurred in January, 1896. Judge Pryor's decision was rendered June 1, 1895. When asked to point out anything in the stipulation itself indicating it was prepared or signed before that date, Judge Barker fails to do so, and states he remembers it was in Mayor Tyler's lifetime. He admits it was not reduced to writing until after the Jefferson Circuit Court had decided in July, 1894, the three prohibition cases (*Ib.*, p. 47), as well as after the second payments of license taxes by the banks, which began January 25, 1895, and continued until April 15, 1895. (Exhibit No. 6, Terry's Depo., Record 362, p. 77.) This is confirmed by the fourth clause of the stipulation, wherein it is recited that the banks had "*paid* the whole of the amount of taxes claimed as against them." (*Ib.*, p. 15.) Thus the preparation and execution of this stipulation must have occurred as late as April 15, 1895, only six weeks before the Pryor decision. In the absence of definite testimony fixing the correct date of its execution, we submit that we were justified in stating it was probably done after that decision, and, having been carried in the memory of counsel for a year or more, was then formulated in writing for the first time.

The apparently intentional and unexplained omission to give this important stipulation a date certainly subjects it to criticism, if not suspicion, for if executed before the liti-

gation ended in the Court of Appeals no good reason can be offered why it was not dated.

It was the duty of appellee, not of appellants, to take the testimony of others who signed this stipulation, in order that the Court might have all the light possible concerning the time and circumstances under which it was prepared and signed by those whose names appear thereto.

We did take the deposition of Mr. Terry, who has been the Secretary of the Commissioners of the Sinking Fund and the custodian of its records for twenty-three years. Being asked if he ever saw or knew anything of this stipulation, he answered as follows (R. 362, pp. 68-69):

> "A. No, sir; I never saw it.
>
> "Q. Was that document ever presented at any meeting of the Board of Commissioners and approved or ratified by it?
>
> "A. Not to my knowledge.
>
> "Q. Is there any minute on the journal of the Board of Sinking Fund Commissioners as to that document?
>
> "A. No, sir.
>
> "Q. Did you ever have it in your custody or control or keep a duplicate of it?
>
> "A. No, sir."

II.

Again, appellee's counsel in their brief (p. 24), speaking of the four banks that repudiated this stipulation, and sued the Commissioners of the Sinking Fund to recover back the license taxes paid by them, notwithstanding their counsel had signed it for them, state:

> "These suits were brought in the spring of 1896. The city promptly answered, setting up this stipulation as a bar."

This charge is repeated time and again in the brief of appellee's counsel.

Now the City of Louisville did not answer at all in said suits, and was not a party defendant thereto. They were brought against the Commissioners of the Sinking Fund, a distinct corporation, whose employed attorney, Judge Barker, filed their answer. He first testified he did not remember whether these suits were against the Sinking Fund or the City, but states (R. 362, p. 59): "They may have been, and probably were, against the Sinking Fund, but, *as attorney for the Sinking Fund,* I set up as a defense this agreement."

After his deposition was closed he, on his own motion, having in the meantime examined the records in said suits, added the following (p. 60):

> "As a part of my answer to said cross-question sixty-four, I desire to incorporate the third paragraph of *the answer of the Sinking Fund of Louisville* to the petition in the case of the German Security Bank *vs. The Sinking Fund of Louisville.*"

Thus it is made clear and beyond question that these four suits of the recalcitrant banks were not against the City at all, and the answers filed therein were not those of the City but of the Sinking Fund.

It is further stated in the brief of appellee's counsel (pp. 37–38) that the City of Louisville, by its own answers in said suits, not only first relied upon said stipulation as a bar in said suits, but admitted in such answers it was the real party in interest in the prohibition suits brought against the Police Court.

We submit that the appellee's counsel are hardly fair, in view of the facts shown by the record, in persistently stating to the Court that the answer of the Commissioners of the Sinking Fund in said suits, prepared and filed by their employed attorney, was the answer of the City of Louisville.

Instead of the City being the first to rely upon said stipulation, or estopped to dispute its validity, it was not even a

party to the suits of the four recalcitrant banks, who were clients of appellee's counsel and the first to repudiate said stipulation as a binding obligation on them. These four suits to recover back license taxes from the Sinking Fund were still pending and undetermined when Judge Barker's deposition was taken.

III.

It is claimed by appellee's counsel in their brief (pp. 33–34) that the rule laid down in Starr *vs.* Hall, 87 N. C., 381, that an attorney under his general authority cannot accept service of the original process in a suit brought against his client, does not apply to the City Attorney of the City of Louisville, "because the relation of client and attorney always exists between the City of Louisville and the City Attorney by virtue of the statute defining the authority of the City Attorney."

The statute does not create the relation of client and attorney between the City and City Attorney before suit is commenced by the issuance and service of the original process on the Mayor.

Its language is:

> "It shall also be his duty to prosecute and defend all *suits* for and against the City, and to attend to such other legal business as may be prescribed by the General Council." (Sec. 2909, Ky. Stats.)

The General Council has not prescribed any other legal business for the attention of the City Attorney, and without such legislative action by the General Council the City Attorney had no power whatever to bind the City by said stipulation with respect to its right to taxes for past or future years against institutions that had brought no suits involving such right.

The following testimony is taken from Judge Barker's deposition (R. 362, p. 48):

> "Q. 36. Was there any corporate action of the City of Louisville, by resolution or otherwise, passed by the General Council of the City of Louisville delegating to you authority to go into any agreement with the banks in respect to the rights of the City and the banks and trust companies.
>
> "A. No; there was no resolution or ordinance passed by the Board of the General Council authorizing me to do that; I did not think it was necessary that there should be; I thought then, as I know now, I had full authority as attorney for the City to make the agreement, and acted upon that supposition, rightfully or wrongfully."

The decision in Hefferman *vs.* Burt, 7 Ia., 320, is not in point, nor is it sustained by the weight of authority. Besides, in that case, the attorney had been employed in relation to that particular case, and the suit was actually brought. The stipulation made merely waived the requirement that the suit should be filed ten days before the approaching term of court. Furthermore, in that case the client recognized the right of the attorney to appear for him by paying part of the judgment, and agreeing to deliver property to satisfy the remainder. The court held that the defendant's remedy was not by appeal; but to enjoin the judgment, or hold the attorney responsible for all damages resulting from his unauthorized act.

In our original brief on this subject we said (p. 74):

> "No precedent was cited in the opinion by the court below, and none has been cited in the brief of counsel for these institutions, upholding an agreement like the one under consideration as coming withing the general authority of an attorney. We venture the assertion that opposing counsel cannot produce a decision of this court, or of the highest court of any State, which

> sustains a stipulation like the one presented in these cases, as being within the general authority of an attorney. In all the cases cited, or that can be cited on this point, it will be found that the stipulation in question by the attorney under his general authority was upheld or enforced with respect to pending cases in court only."

Although the briefs of appellee's counsel were prepared after they saw this challenge in our original brief, it has not been met or answered by the production of a single decision in point. This challenge is still open pending the oral argument of these cases.

That the authority of a corporation counsel or city attorney is no greater than the general authority of a retained private attorney, is abundantly established by the authorities. (People and Taylor *vs.* Mayor, 11 Abb. Pr. 66; our original brief pp. 72–73.)

IV.

We furthermore insist that the Circuit Court and this Court are without jurisdiction in these cases based as they are on purely non-Federal questions, which pertain only to matters of evidence to uphold a plea of *res judicata*, and the authority of an attorney under general law, or of the City Attorney of the City of Louisville, under the statute of the State of Kentucky for the government of that City. (Phœnix Fire & Marine Insurance Co. *vs.* Tennessee, 161 U. S., 183.)

In this connection we desire to cite this Court to the recent decision in the case of Union & Planters Bank *vs.* City of Memphis *et al.*, 46 S. W. Rep., 557–561, decided April 2, 1898. There the Supreme Court of Tennessee, in an able opinion by Justice McAlister, unanimously held, under a state of facts very similar to that shown in these cases, upon said bank's plea

of *res judicata* by reason of two prior decisions of that court in cases to which the City of Memphis was a party (State *vs.* Butler, 13 Lea, 400; City of Memphis *vs.* Union & Planters Bank, 91 Tenn., 546), that its said prior adjudications holding that said bank was by its charter, contractually exempt from the payment of all municipal taxes to said city, did not estop said city from claiming and collecting from said bank privilege taxes as well as *ad valorem* taxes.

The court on that point states (*Ib.*, 561):

> "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. *Since this is not a Federal question*, we decline to follow the ruling in City of New Orleans *vs.* Citizens Bank, 167 U. S., 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved. In State *vs.* Bank of Commerce, 95 Tenn., 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case.'"

As in our original brief, we respectfully submit that the decrees appealed from herein should be reversed, with direction to the Court below to dismiss the appellee's bills.

WILLIAM S. TAYLOR,
Attorney-General,
For Samuel H. Stone, Auditor et al.

HENRY LANE STONE,
City Attorney,
For City of Louisville.